Supreme Court, U. S.
FILED
MAR 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1459

[redacted], *ex rel.*
ERNEST FEELINGS,

Petitioner,

v.

EUGENE LEFEVRE, *Superintendent, Clinton Correctional Facility, New York,*

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Clinton Correctional Facility, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment entered on December 21, 1978, by the United States Court of Appeals for the Second Circuit, affirming the decision and judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) which dismissed petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Opinion and Proceedings Below

The only opinion is that of the District Court, set forth in Appendix A hereto. It has not been reported. The Second Circuit (Feinberg, Mulligan and Gurfein, *C. JJ.*) affirmed the judgment of the District Court without opinion. Petitioner moved for reargument of the appeal. The motion for reargument was denied by the same panel in an order entered February 22, 1979.

There are no reported opinions from the underlying New York State proceedings. Petitioner was tried on an indictment for felony-murder in the Supreme Court of the State of New York, Kings County, before Hon. Hyman Barshay and a jury. Pretrial *Wade* and *Huntley* suppression hearings were held before Justice Barshay on December 1 and 2, 1971. Trial was held on March 13-20, 1972, resulting in a verdict of guilty. Judgment of conviction of petitioner was entered September 15, 1972, and the trial court affixed a sentence of imprisonment of twenty years to life.

Petitioner's appeal of his conviction in state court was summarily affirmed by the Appellate Division, Second Department, on March 19, 1975, and petitioner's application for leave to appeal to the New York Court of Appeals was denied on July 19, 1975. In 1973 petitioner sought vacation of his sentence through a *coram nobis* proceeding in state court, but his petition was denied and the denial affirmed in the 1975 appeal.*

Jurisdiction

The jurisdiction of this Court is based upon 28 U.S.C. § 1254 (1).

* There were also proceedings in New York State court before Hon. Vincent Damiani involving co-defendants of petitioner tried separately in 1969. These proceedings, of which there are again no reported opinions, are described more fully in the Statement of the Case below.

Statutes Involved

Constitution, Amendments V and and XIV, § 1:

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Amendment XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Question Presented

Was petitioner's alleged confession improperly introduced in evidence against him at his trial, in violation of

his rights of due process under the Fourteenth Amendment, when that confession was obtained pursuant to New York's procedures of "delayed arrest" by which the need to advise petitioner of his rights to remain silent and to counsel were delayed past the point when arraignment was required?

Statement of the Case

By his petition in this case petitioner seeks this Court's review of a pattern of arrest which New York has followed for many years in homicide cases. This pattern, which was followed in this case, involves a two-step arrest process. The first "arrest" is the actual apprehension and taking into custody of the suspect by the police. The second "arrest"—the formal arrest—comes only later when the suspect is brought before a State assistant district attorney. Only after the second "arrest" are steps begun leading to court arraignment. In between the two "arrests", as happened in this case, police interrogation continues, with the suspect being given *Miranda* warnings or otherwise accorded meaningful Constitutional safeguards only after the police have firmly secured his willingness to confess and the nature of his confession.*

As the particular and unusual facts in this case demonstrate, while this two-step procedure has the appearance of affording additional protection to suspects in police custody, in actual practice it has an inherent susceptibility to let Constitutional safeguards fall by the wayside. Here the procedure resulted in a conviction based almost exclusively

* For a recent case involving New York's "police procedure requiring" this two-step process "prior to an arrest for homicide," *see People of the State of New York* v. *De Jesus*, 63 A.D.2d 148, 150, 407 N.Y.S.2d 5, 7 (1st Dept. 1978). *See also People of the State of New York* v. *Stroh*, 63 A.D.2d 326, 327, 408 N.Y.S.2d 77, 78-79 (2nd Dept. 1978).

on a highly suspect confession attributed by the police to petitioner.*

The Crime

The events in this case involve a robbery and murder committed at the Leonard Electrical Company in Brooklyn, New York, on December 1, 1967.** About 4:15 p.m. on that day, which was a Friday, three armed men entered the management offices of the company, where the week's payroll had just been delivered. In the course of the robbery, which lasted only minutes, one of the three men went into the inner office of the company's president, Nathan Leonard, and in a brief altercation fatally shot Mr. Leonard. As the three men retreated from the offices, an

* The facts recited in the Statement of Facts are not taken solely from the record of petitioner's trial relied upon by Judge Weinstein in his opinion (Appendix A). The reason for this is that there are two trial records which contain the relevant facts, petitioner's trial in 1972 and the trial of four of his co-defendants three years earlier in 1969. Trials widely separated in time had been occasioned because, from shortly after his arrest in early 1968, petitioner had been committed to Matteawan State Hospital as legally insane and hence incompetent to stand trial. He was not released from Matteawan until December 1970, after the completion of proceedings involving the four co-defendants.

In the habeas proceeding in the District Court below, Judge Weinstein had only petitioner's trial record. He did not have the much longer and more detailed record of the earlier trial involving petitioner's co-defendants. The transcript of the earlier proceedings was obtained only in connection with petitioner's appeal to the Second Circuit, when the undersigned was first assigned as petitioner's counsel. That record had been stored in a basement piperoom in the New York State Supreme Court building in Brooklyn and was found by the undersigned with the kind help of John R. Addeo of the New York State Criminal Appeals Bureau. A review of the transcript of the 1969 co-defendants' trial showed that Judge Weinstein had only a partial view of the facts relevant to petitioner's application for habeas relief.

** References "... .a" are to Judge Weinstein's opinion in the Appendix. References "1969 R.." and "1972 R.." are to the respective records referred to in the preceding footnote. The general description of the robbery is taken from the *Wade* and *Huntley* hearings involving petitioner (1972 R20-266), but there are no material discrepancies between the 1972 record and the 1969 record until the facts regarding petitioner's arrest.

employee of the company, Harold Abrams, tried to grapple with the man who had shot Mr. Leonard. In the scuffle Mr. Abrams was himself shot twice by the same man and was seriously wounded. The three robbers then escaped.

Officers of the New York police department arrived at the company within a few minutes of the shooting. Among the officers were Detectives Caltagirone and Rinaldi, the two detectives who were to remain in charge of the investigation of the crime throughout all subsequent events.

Investigation of the Case

Under their direction, the police began to assemble what information they could about the crime. Despite the presence of several employees of the company who had witnessed the shooting, the police obtained no positive identifications of any of the three men who had entered the company's offices (1969 R905-6). A suspect's sketch was made as a result of questioning the employees which showed the man who killed Mr. Leonard and shot Mr. Abrams to be a Black with an Afro haircut. However, the particular description of the assailant given by Mr. Abrams to the police later in the hospital was of a Black who had been wearing a hat. A second employee, Barry Anderson, gave a description of the assailant as a Black with straight hair rather than an Afro. (At petitioner's trial, it was established that the time during which the assailant was observed amounted only to "seconds" and both Abrams and Anderson were unable to remember details of the assailant's features or dress (1972 R352-74).)

The police knowledge of the crime was improved on December 3, 1967. On that day a man named George Wilson offered to give the police some information about the crime in return for money. Wilson, who feared that he was possibly being "fingered" as a suspect by other members of his family, gave the police three names to check out: John Wilson, Herman Fillyaw and Morse Fillyaw. All three of these individuals were related to each other and to George Wilson (1969 R1007).

As a result of this lead, the police, under the direction of Detectives Caltagirone and Rinaldi, took John Wilson and the two Fillyaws into custody on December 4, 1967 and questioned them about the crime throughout the night. They did not, however, arrest them, and they did not give them any *Miranda* warnings (1969 R149-50, 1120-22). All three had alibis concerning their whereabouts at the time of the crime on December 1st, although the police did learn that John Wilson had once been employed by the Leonard Electrical Company and was familiar with the layout of the company's offices and the routine followed for the company's weekly payroll. The police also learned that the two Fillyaws had a plumbing truck at their disposal that day (1969 R140-147).

From their questioning on the night of December 4, the police obtained another lead, the name and address of a woman named Johnnie Mae Zimmerman, the wife of Willie Brigham (1969 R296). The police questioned Miss Zimmerman on December 8, 1967 and obtained a photograph of Brigham from her (1969 R296). From this they were later able to obtain photographs of Brigham from the State's Bureau of Criminal Investigation, which they subsequently showed several times to Mr. Abrams in the hospital (1969 R903).

This was essentially the extent of the police's knowledge about the crime through December and into early January: the attempt by George Wilson to implicate his three cousins in order to throw suspicion off of himself, and the names of four suspects who had enough familiarity with the location and routine of the Electrical Company to have committed the crime but three of whom, at least, had given alibis. Up to this time the police had no information of any kind about petitioner, not even his name, and they had no clue about who among their suspects might have actually fired the shots which killed Mr. Leonard and wounded Mr. Abrams.

Petitioner's Arrest

On January 8, 1968, the police received an anonymous tip that Brigham could be found that afternoon in an apartment at 330 Greene Avenue in Brooklyn (1969 R295). This tip, according to the testimony of Detectives Caltagirone and Rinaldi, also gave the police for the first time a name associated with petitioner ("Snooky") as a suspect in the crime and a friend of Brigham. It is not clear, however, whether the police at this point had petitioner's actual name or only the name "Snooky" (1972 R85; 1969 R91).

At about 2:30 p.m. the two detectives, accompanied by other officers, went to the apartment at 330 Greene Avenue. They had no arrest or search warrants with them (1969 R754). They knocked on the door and identified themselves either by saying the name "Snooky" or identifying themselves as "Police".* A voice from inside said "Wait a minute", but no one came to the door. After a short pause, the police broke down the door. They found no one in the apartment, but in the rear courtyard two officers who had been stationed there to block any escape were in the process of apprehending two partially clad men, Brigham and petitioner.

The police let the two men return to the apartment to dress more warmly. The police also confiscated narcotics paraphernalia and an amount of drugs which were in the apartment (1972 R208). (Brigham later testified that he had taken heroin that morning (1969 R655-58), and petitioner himself was subsequently treated for withdrawal symptoms at Lutheran Hospital in Brooklyn about 3 a.m.

* This discrepancy is significant. If the police hoped to lure Brigham out of the apartment by using the recently acquired name of his friend ("Snooky"), it indicates that they did not expect to find petitioner inside the apartment. It was at the 1969 trial that the testimony shows the police used the word "Snooky" at the apartment door (1969 R91). At the 1972 trial of petitioner, the testimony is that the word "Police" was used (1972 R85). It is thus not clear from the record whether the anonymous tip on January 8 indicated petitioner's involvement in the crime, although the 1972 record is to the effect that the tip directly implicated petitioner.

on January 9, or about twelve hours after his arrest (1972 R226, 281).)

This was the first of petitioner's two "arrests". The second would not come until after his alleged confession. At the time of the arrest at Greene Avenue the police at least informed Brigham that he was being taken into custody in connection with the Leonard Electrical Company crime and that they "had information that he was involved in this stick-up" (1969 R312-13). There is no indication that they made a similar disclosure to petitioner upon arrest, although it is clear that during the course of the afternoon they interrogated petitioner about whether he had been involved in the crime, which he denied (1972 R90-91).

The police handcuffed petitioner en route to the 68th Precinct in Brooklyn and drove him there in a car separate from that used to take Brigham to the precinct. There was further questioning of petitioner at the precinct about the robbery, but no inculpatory statements were obtained from him (1972 R91-96). Brigham continued to be kept separate (1972 R100-12). Neither at the time of petitioner's arrest nor during any of the questioning following it that afternoon, either in the Greene Avenue apartment, in the squad car or at the precinct, was either petitioner or Brigham given any *Miranda* warnings. Neither petitioner nor Brigham was booked, arraigned or fingerprinted upon arrival at the precinct, or at any time during the course of the afternoon and early evening.

At 5:05 p.m. the first of two line-ups was conducted of petitioner and Brigham. The first was held at the precinct. Four Black policemen in civilian clothes were used to fill out the line-up, which was observed by three of the company employees who had witnessed the robbery, Evelyn Paccione, Aldo Arnone and Mr. Anderson.* Arnone and

* Mr. Arnone is called "Al Roney" by Judge Weinstein in his decision below (27a).

Paccione were unable to make identifications, but Anderson identified both Brigham and petitioner. There was no counsel present on behalf of either suspect at the line-up (1969 R315, 551-56, 888-93; 1972 R58).

The police then took Brigham and petitioner, again in separate cars, to the hospital where Abrams was still recovering from his gunshot wounds. Between 6:20 and 6:30 p.m. a second line-up was conducted at the foot of Abrams' hospital bed, with the same four Black police officers filling out the line. Abrams identified both Brigham, whose pictures he had previously been shown by the police, and petitioner. Again no counsel was present. Still no *Miranda* warnings had been given to either Brigham or petitioner (1969 R81, 221, 314-15, 901-05; 1972 R42-47, 58).

The two suspects were driven back to the precinct in the customary separate cars, reaching the precinct between 6:30 and 6:35 p.m. Shortly thereafter, according to the testimony of Detectives Caltagirone and Rinaldi, petitioner allegedly stated his desire to make a statement "because they crossed me", and a statement supposedly made by petitioner was thereafter taken by the two detectives in their notebooks, soley in their presence. The statement, if true, not only implicated petitioner in the Leonard Electrical Company robbery, but contained an admission that it was petitioner, and not any of the others, who fired the fatal shots (1972 R97-142).

The Problem of When
Petitioner Was Given Miranda Warnings

According to both Caltagirone and Rinaldi, as soon as petitioner expressed his desire to make a statement, they first advised him of his rights by use of a police form containing the standard *Miranda* warnings. They testified that they read him the warnings one at a time, recorded his answers on the form, and had him sign the form. They testified that this was the first time since his being taken into custody that petitioner was advised of his rights under *Miranda* (1972 R104-11, 162-68).

But the detectives' testimony, when probed in the light of the 1969 proceedings, is unreliable—far more so than the District Court realized. The *Miranda* form sheet which was used to take down petitioner's responses bears the time 7:10 p.m., written in by Detective Caltagirone (1972 R101). However, the transcriptions contained in the two detectives' notebooks of the statement allegedly given by petitioner contain time notations of "6-4 p.m." (Caltagirone's notebook) and "6:45 p.m." (Rinaldi's notebook)—in both instances some half an hour *before* the time notation on the *Miranda* sheet (1972 R125-27, 156).

In their testimony at the *Huntley* hearing prior to petitioner's 1972 trial, the detectives tried to explain that this discrepancy was inadvertent and that they were sure petitioner had been advised of his rights before any statement was taken (1972 R153). Thus on the first day of the *Huntley* hearing, Detective Caltagirone testified that the notation "6-4", which he said meant 6:40 to 6:49 p.m., was a mistake. He testified that the statement transcribed in his notebook was taken after 7:10 p.m., the time he had noted on the *Miranda* sheet, and that the *Miranda* sheet was accurate. This coincided with Caltagirone's testimony that he had spoken to petitioner for "ten or fifteen minutes" prior to "the exact time when he said he wanted to tell the truth" (1972 R102) and with the fact that recording petitioner's alleged statement itself took at least fifteen to twenty minutes (1969 R305).

When Detective Caltagirone resumed the stand on the second day of the *Huntley* hearing, however, defense counsel cross-examined him on the basis of his testimony at the 1969 trial of petitioner's co-defendants. There Caltagirone had testified that the *Miranda* sheet was in error and that the "6-4" annotation in his notebook next to petitioner's alleged confession was correct (1972 R125-30). On the basis of this cross-examination, Caltagirone corrected his testimony of the first day, now stating that the

notebook was right and the *Miranda* sheet in error. He remained sure that in any event the *Miranda* warnings had been given first.

Detective Rinaldi followed Caltagirone on the stand at the *Huntley* hearing. He confirmed the time of petitioner's alleged confession has having begun abount 6:45 p.m., the time entered in his notebook next to his transcription of petitioner's alleged confession. He also confirmed, on the basis of a marginal notation in his notebook reading "Advised of his rights" (without any hour indicated), that petitioner had been read his Constitutional rights before allegedly confessing. Detective Rinaldi said such a notation was his usual practice (1972 R154-60).

On cross-examination, however, it was established that such notations were not contained next to all the confessions of petitioner's four co-defendants who had been tried in 1969. There were notations next to the notebook statements of two others arrested on January 8 (Brigham and Morse Fillyaw), but there were none next to the statements of Herman Fillyaw and John Wilson. Wilson's statement in Rinaldi's notebook, it turns out, had been a trial exhibit at Wilson's trial in 1969, and the statement of Herman Fillyaw had been ordered sealed by Justice Damiani at Wilson's trial by taping pages of the notebook (1969 R1449). These pages had remained sealed until Detective Rinaldi took the stand on the second day of petitioner's *Huntley* hearing, when Justice Barshay permitted them to be unsealed (1972 R174).

It was also established on cross-examination that Detective Rinaldi had been given his notebook by the prosecutor on the preceding day, and that the prosecutor had discussed with him the "dispute" which had arisen from Detective Caltagirone's inconsistent testimony about the timing of the *Miranda* warnings supposedly given to petitioner (7:10 p.m.) and petitioner's alleged statement as

noted in Caltagirone's notebook (6-4 p.m.). Rinaldi had even been allowed to take his notebook home overnight before taking the stand on the second day of the *Huntley* hearing (1972 R175-77). The opportunity for insertion of marginal notations in Rinaldi's notebook ("Advised of his rights") where no inconsistency could be traced to 1969 is obvious.

Despite the inconsistencies, however, the trial court concluded at the end of the *Huntley* hearing that petitioner's alleged confession, as recorded in the two detectives' notebooks, should be admitted at trial.

At trial, the two detectives generally testified consistently with the sequence of events as established in the second day of petitioner's *Huntley* hearing: that they had given petitioner *Miranda* warnings prior to taking any statement, and that the discrepancy in the times indicated on the *Miranda* form and in their notebooks was an inadvertent error (1972 R406-21). Petitioner's alleged confession was then read at trial to the jury, not just once but five times in all. Petitioner, while he had testified at the *Huntley* hearing of his innocence of the crime and also of his having no recollection of ever having signed any *Miranda* form or made any statement, did not testify at trial.*

The Additional Problems of How Petitioner's Alleged Statement Was Made and Its Relationship to the Arrests of Petitioner's Co-Defendants

From his review of the 1972 record, Judge Weinstein was at least aware that the timing of petitioner's *Miranda*

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* Petitioner's alleged confession was read to the jury five times because, in addition to its being read once by Detective Caltagirone and once by Detective Rinaldi, it was also read as evidence supporting petitioner's rationality in rebuttal of his asserted defense of insanity, it was read in summation by the prosecution, and it was read in paraphrase by the trial court in its charge to the jury (1972 R405-06, 480-84, 529-32, 640-41, 682-83).

warnings was on the surface incompatible with the timing indicated in the detectives' notebooks for petitioner's alleged statement. But he was unaware of additional problems—as was Justice Barshay—which further undermine even the possibility that petitioner was properly informed of his Constitutional rights.

At petitioner's trial, Detectives Caltagirone and Rinaldi testified that petitioner's confession, amounting to several pages in their notebooks, was "verbatim", meaning that it was a consistent narrative, a continuous flow of events as recounted by petitioner (1972 R118-20). This supposed narrative quality of the statement was also relied upon by the prosecution's expert psychiatrist in using the confession to establish petitioner's sanity (1972 R540-42).

In fact, however, at the 1969 trial the testimony of Detectives Caltagirone and Rinaldi had been that petitioner's alleged confession was not in narrative form at all but had been arduously taken down "verbatim" in answer to specific questions over a period lasting from twenty minutes to half an hour, with only the alleged answers but *not* the questions recorded—for "ease" and "continuity" of reading, as they put it (1969 R305-08, 395-96).

If petitioner's alleged statement was thus obtained over a considerable period of time, it is unlikely that it could have been obtained as early as 6:45 p.m., particularly when the detectives testified that they had had some "ten or fifteen minutes" of conversation with petitioner after the hospital line-up before "the exact time when he said he wanted to tell the truth" (1972 R102). However, the subsequent events at the 68th Precinct on the evening of petitioner's arrest suggest that Detectives Caltagirone and Rinaldi must have had petitioner's alleged statement prior to 7 p.m.

In accordance with New York's procedures in homicide cases, the Assistant District Attorney (Alfred Allatin) was called at his home near 7 p.m. and advised to come down to

the precinct because the case seemed to be breaking (1969 R445-46). A stenographer (Robert Machlis) was also called, and both he and Mr. Allatin arrived at the precinct around 7:30 p.m. (1969 R420). In the meantime, instructions had been given by the police about 7 p.m. to arrest the other suspects who had been questioned on the night of December 4, 1967, and these individuals were apprehended beginning that evening: John Wilson at about 8:30 p.m. (1969 R809) and Morse Fillyaw at about the same time (1969 R577). Herman Fillyaw was not arrested until January 10, 1968.

Moreover, petitioner's alleged statement was used by Detectives Caltagirone and Rinaldi to obtain statements from the other suspects. Brigham, *after* being confronted by petitioner, made a statement at 7:25 p.m. (1969 R37, 284). When Morse Fillyaw was brought into the precinct, he too was confronted by petitioner, subsequent to which (9:25) he gave a confession consistent with petitioner's (1969 R60, 268).* Similarly, John Wilson, after he was brought in and again after a confrontation, also made a confession consistent with petitioner's at 9:50 p.m. (1969 R68, 159).** All these initial confessions—petitioner's first (if it was in fact made), Brigham's at 7:25, Fillyaw's at 9:25, and Wilson's at 9:50—were given first *just* to Detectives Caltagirone and Rinaldi, before any of the suspects

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* At the pretrial hearings in 1969, Morse Fillyaw testified that Detective Caltagirone told him to sign the *Miranda* sheet without reading it because "it can't hurt you" (1969 R593), and Caltagirone conceded that he in fact said this to one of the defendants (1969 R135).

** It should be noted that when Wilson was arrested at his home that night, he told his wife in the presence of the arresting officers to call his lawyer, Jerome Sussman, and he gave his wife a card with Mr. Sussman's home telephone number (1969 R578, 581-82). Mrs. Wilson reached Sussman at home (1969 R675). Sussman called in his representation to the 68th Precinct but said he would not come down that night, stating that he would appear at Wilson's arraignment the next day (1969 R698-99). Sussman had left standing instructions with Wilson not to make any statement in his absence (1969 R700), instructions which Wilson curiously did not follow that night.

were questioned in any way by Assistant District Attorney Allatin.

There are further inconsistencies surrounding these statements, however, and they concern the nature of the confrontations with petitioner. At petitioner's *Huntley* hearing, there was testimony that in these confrontations petitioner had himself repeated his alleged statement in the presence of the others arrested that night, although Justice Barshay cut off further inquiry into this subject as "highly prejudicial" (1972 R223-25). The 1969 record is clear, though, that petitioner's alleged statement was *never* repeated by him but was instead read to the others by Detectives Caltagirone and Rinaldi (1969 R21-22).

In addition, after each "verbatim" statement had thus been transcribed by Detectives Caltagirone and Rinaldi in their notebooks, each suspect was taken into another room for "formal arrest" by Assistant District Attorney Allatin, on the record. Petitioner was the first suspect to be questioned by Allatin, but after being given the *Miranda* warnings he refused to give any statement and requested a lawyer (1972 R225; 1969 R473). By contrast, when the others arrested that night—Brigham, John Wilson and Morse Fillyaw—were read *Miranda* warnings by Mr. Allatin, they each repeated the statements they had given earlier to Detectives Caltagirone and Rinaldi (1969 R420-33). Why they did so (in Wilson's case notwithstanding his attorney's instruction) may have been partially for the reasons recorded by Detectives Caltagirone and Rinaldi in their notebooks: *e.g.*, "because they ratted on me" (Brigham) and "because I have nothing to hide" (Wilson) (1969 R37, 60, 68). But each confessed *only* after having heard petitioner's alleged statement in which it was clear, if the confession were accurate, that petitioner alone confessed to holding the gun whose shots killed Nathan Leonard and wounded Harold Abrams (1969 R21, 155-66, 329-30, 373-76). After hearing that alleged confession, all the others who

had known since early December of 1967 that they were suspects in the crime (and were related to each other as well) knew also that at least none of them would be charged with the actual shooting. That would fall on petitioner*

On the night of the arrests, Allatin wrote up his report of the arrests between 10 p.m. and midnight and then "called in the case completed" to the District Attorney's office (1969 R470). Petitioner had not yet been arraigned, and indeed had not been formally "booked". He would not be booked until 2 a.m., just before being taken to Lutheran Hospital for treatment of withdrawal symptoms. He and the others would not be arraigned until the courts opened later that morning, January 9. At arraignment, petitioner was finally assigned counsel, but all proceedings against him were stayed because of his subsequent years of hospitalization (1972 R265-95).

Reasons For Granting The Writ

On the foregoing facts, the writ sought by petitioner should be granted.

First, the potential for use at trial of an improper if not false confession arises clearly from these facts, and is squarely attributable to the two-step procedure of petitioner's arrest. As far as the officers were concerned who

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* If such was the thinking of petitioner's co-defendants, they failed to take into account that indictments for felony-murder, as they were later charged with, would attribute the killing of Mr. Leonard to each of them. However, some practical consequence may be inferred from the fact that petitioner incurred the heaviest sentence. Of the other defendants tried in 1969, only John Wilson went through a full trial. He was found guilty and sentenced to fifteen years' imprisonment to life (1969 R1573-76, 1d-12d). After pretrial suppression hearings, Morse Fillyaw and Willie Brigham agreed to pleas of manslaughter (1969 R1019-27, 1c-19c). Fillyaw was given a six year prison sentence. Herman Fillyaw agreed to a plea of conspiracy to commit robbery, and received a sentence of three years' imprisonment (1969 R1c-19c).

took him into custody on the basis of an anonymous tip, his formal arrest—much less any arraignment—would not come until the arrest by Assistant District Attorney Allatin. Until then, petitioner was in a form of custody where the protective strictures of the Constitution set forth in *Miranda* were conveniently unclear. The police could interrogate petitioner about the Electrical Company robbery, as they did, without giving him *Miranda* warnings; and they could have him placed in not one but two line-ups, without counsel, as they did, again without giving him *Miranda* warnings.

Perhaps more significantly, the police could easily have believed they had the prime suspect of their investigation without realizing the totality of fortuitous events which brought petitioner into their custody. They had not known his name or his identity until the day of his arrest, and they may not have known it when they arrested him. The other suspects involved the police had known for some time—as those suspects knew all too well themselves. Moreover, the others knew that a murder had been committed for which the police, prior to petitioner's arrest, had no suspect other than themselves. The likelihood is thus high that petitioner had been to a large extent framed, knowingly by his co-defendants even if unwittingly by the police. Petitioner's established addiction on the day of his arrest, and his actual insanity and later commitment to Matteawan State Hospital during the time of all proceedings involving his co-defendants, only helped to compound the likelihood of error.

These factual considerations are given legal stature warranting the granting of the writ here under this Court's decisions in *Townsend* v. *Sain*, 372 U.S. 293 (1963), *Mallory* v. *United States*, 354 U.S. 449 (1957) and *McNabb* v. *United States*, 318 U.S. 332 (1943), as well as in *Miranda* v. *Arizona* itself, 384 U.S. 436 (1966). These decisions are incompatible with New York's delayed arrest procedures in homicide cases as followed in this instance.

POINT I

New York's Delayed Arrest Procedures in Homicide Cases, as Applied in This Case, Are Unconstitutional.

A federal court must grant an evidentiary hearing to a habeas applicant if "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" or "the material facts were not adequately developed at the state court hearing." *Townsend* v. *Sain*, 372 U.S. 293, 313.

Under this test, the District Court found, correctly, that the State court had made inadequate factual findings to support a determination that petitioner had waived his Fifth Amendement privilege and his right to counsel. Instead of conducting an evidentiary hearing to develop *all* the facts relevant to that issue, however, the District Court conducted a very limited hearing. The only testimony taken at the hearing was psychiatric testimony, and the only issue addressed was the issue of petitioner's sanity at the time he made his alleged confession.*

The District Court erred in so restricting the scope of the hearing. The voluntariness of petitioner's waiver of his Fifth Amendment privilege and his right to counsel involved far more than the issue of his sanity on January 8, 1968. It involved the full circumstances by which the police could, with relative impunity, ignore the rudiments of petitioner's Constitutional rights simply because he had not yet been formally arrested.

a. Delay in Arraignment

Despite the fact that he was apprehended at 2:30 p.m. on January 8, was identified in two line-ups that afternoon

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* At the beginning of the District Court hearing Judge Weinstein requested testimony from the two detectives who had interrogated and secured petitioner's alleged confession. For reasons which do not appear from the record, those two witnesses never appeared to testify.

and was in continuous police custody all that afternoon and evening, petitioner was not brought before a court for arraignment until the morning of January 9. This Court has mandated that no evidence taken during an unnecessary or unreasonable delay in arraignment, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, may be admitted in Federal criminal proceedings, *Mallory* v. *United States,* 354 U.S. 449 (1957); *McNabb* v. *United States,* 318 U.S. 332 (1943); *United States* v. *Middleton,* 344 F.2d 78 (2d Cir. 1965) (where the time lapse between arrest at 7 p.m. on one day and arraignment at 9 a.m. the following morning was held to be both "unnecessary" and "unreasonable").* New York CPL Section 140.20, which governed the procedures used in this case, imposes a requirement of arraignment without unnecessary delay similar to the requirement which governs in Federal cases. The New York courts have also held that an overnight delay in arraigning a suspect already in custody is unnecessary. and constitutes a "prima facie suspect circumstance". *People* v. *De Jesus,* 63 A.D.2d 148, 407 N.Y.S.2d 5 (1st Dept. 1978).

No explanation was offered by the police officers to the State court for their long delay in arraigning petitioner. The police had two line-up identifications by late afternoon, and did not need his confession as justification for regarding him as a suspect subject to further detention. *See Mallory* v. *United States,* 354 U.S. at 445. The unavailability of a magistrate during evening hours did *not* license continued interrogation of petitioner. *United States* v. *Middleton,* 344 F.2d at 82. Nor did any eventual giving of *Miranda* warnings (if they were given) relax the need for compliance with the *McNabb-Mallory* rule. *Miranda* v. *Arizona,* 384 U.S. at 463. The rationale for the rule—that unwarranted delay gives the police an opportunity to elicit damaging statements—is further invoked by the facts of this case, where

* While the *McNabb-Mallory* Rule has a statutory basis, it is also grounded in Fifth Amendment policy. *Miranda* v. *Arizona,* 384 U.S. 436, 463 (1966).

there is a visible pattern of police interrogation so as to break later suspects by use of a confession made by the first defendant arrested and questioned. *Mallory* v. *United States,* 354 U.S. at 454.

b. Absence of Counsel

Petitioner's statement was, of course, taken without counsel present. While this would not invalidate the confession *per se,* absence of counsel put a heavy burden on the State to demonstrate the voluntariness of the confession. *Miranda* v. *Arizona,* 384 U.S. at 475; *United States ex. rel. B.* v. *Shelly,* 430 F.2d 215 (2d Cir. 1970). In addition, in the only instance when we have a record of the questions asked him, petitioner refused to make any confession to Assistant District Attorney Allatin and demanded counsel at that time.

Under the circumstances of petitioner's interrogation, his failure to insist on the presence of counsel could not, as a matter of law, be construed as a voluntary waiver. The following sequence of events was uncontested and emerges very clearly from the record. In the course of being given his *Miranda* warnings—assuming that they were in fact given at 6:45 and not at 7:10, and indeed that they were given at all—the petitioner was asked whether he had an attorney. He responded that he did (6a). Rather than going on to ask any of the logical follow up questions, such as "Would you like to call your attorney?" or "Who is your attorney?", or "Would you like to have your attorney present?," the interrogating officer simply went on mechanically reading from the form listing the *Miranda* warnings. He then proceeded to take the supposed inculpatory statement from the petitioner.

This Court has recognized that the right to counsel lies at the heart of the panoply of rights accorded to criminal defendants; without the presence of counsel there will always be a serious question as to whether other

rights were intelligently and freely waived. *Miranda* v. *Arizona,* 384 U.S. 436, 469 (1966). As a corollary to this principle, the courts have held that the State bears a heavy burden to show waiver of the right to counsel. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962). Such a waiver may not be inferred from the silence of the defendant, even after warnings are given. *Miranda* v. *Arizona,* 384 U.S. at 475-76; *United States* v. *Montos,* 421 F.2d 215 (5th Cir.), *cert. denied* 397 U.S. 1022 (1970). It is not enough to show that the defendant understood his rights; it must be shown that he affirmatively relinquished them. *Brewer* v. *Williams,* 430 U.S. 387 (1977).

Where the other circumstances surrounding the questioning are sufficiently suspicious, the courts have required the State to prove that the defendant *expressly* declined the assistance of counsel; his signature on a standard form of notice and waiver of rights is insufficient to show express declination. *Sullins* v. *United States,* 389 F.2d 985 (10th Cir. 1968). Where the defendant has actually *asked* for counsel, *Miranda* v. *Arizona,* 384 U.S. at 445, or has indicated that he has counsel, *Misner* v. *United States,* 384 F.2d 130 (5th Cir. 1967), the interrogation must cease until counsel is secured. Any incriminating statements obtained in contravention of this rule are inadmissible, *United States* v. *Massey,* 550 F.2d 300 (10th Cir. 1977); *United States* v. *Blair,* 470 F.2d 331 (5th Cir.), *cert. denied* 411 U.S. 908 (1972), even where the defendant has agreed to go forward with the questioning before calling his attorney, *United States* v. *Nielson,* 392 F.2d 849 (7th Cir. 1968). Where there is any question as to whether the defendant's response constitutes an assertion of his right to counsel, all questioning should cease until the state has determined whether or not he wants counsel present. *Cf. United States* v. *Riggs,* 537 F.2d 1219, 1222 (4th Cir. 1976) (if suspect's statement

may be construed as invocation of a right to remain silent, government agents should clear up ambiguity before proceeding with interrogation).

Under the circumstances in which the petitioner's alleged confession was supposedly taken in the instant case—including the lapse of time between arrest and arraignment, the uncertainty as to the time of the *Miranda* warnings and petitioner's psychological instability and use of drugs—nothing short of an express declination should have sufficed to base a finding of voluntariness. Far from being able to show such declination, the State conceded that petitioner had responded affirmatively to the question "Do you have an attorney?" The response would suggest that petitioner was prepared to invoke his right to counsel, as he unquestionably did shortly thereafter before Mr. Allatin. At the very least it called for a clarification by the investigators.

The District Court should have found that the petitioner's failure expressly to request the presence of counsel under the circumstances could not be considered a voluntary waiver. Since the confession was inadmissible if obtained in derrogation of constitutional rights not voluntarily waived, the error is material and the writ of habeas corpus should have issued.*

c. The Potential for Mistake

Other important circumstances surrounding the interrogation were never adequately explained and reinforce the legitimate doubts as to voluntariness raised by the foregoing facts. The records of the co-defendants' trials show

* If petitioner's confession was indeed involuntary, his conviction may not be allowed to stand even if there is other evidence sufficient to sustain the verdict. *Stroble* v. *California,* 343 U.S. 181, 190 (1952). In this case, the confession was so heavily emphasized at trial that its introduction could not possibly have constituted harmless error. The confession was read to the jury no less than five times, and was introduced not only for the purposes of proving petitioner's guilt but also for the purpose of vitiating his defense of insanity.

that with the exception of Brigham, the police did not bring in the other defendants until after petitioner had been in custody for several hours. Then the police used petitioner and his statement, after securing it, to confront his co-defendants and induce them to follow suit. At their trial, there was considerable testimony of police intimidation and threats, and even a concession by Detective Caltagirone that he said signing the *Miranda* sheets couldn't hurt. If indeed the police regarded petitioner's confession as the key to obtaining all the others', they would have had an overwhelming motive to secure his statement by whatever means. If they deceived him into believing that he had already been implicated by one of his co-defendants, then the trustworthiness of the confession must be suspect. *Cf. Spano* v. *New York,* 360 U.S. 315 (1959); *United States ex rel. Everett* v. *Murphy,* 329 F.2d 68 (2d Cir. 1964), *cert. denied* 377 U.S. 969 (1965).

In addition, the fact that appellant was under the influence of narcotics at the time of his arrest and alleged confession, and that he suffered withdrawal symptoms and had to be taken to a hospital within hours thereafter, is significant. It is well established that a person under the influence of narcotics may not be sufficiently in control of his own actions to render a "voluntary" confession. *Townsend* v. *Sain,* 372 U.S. 293 (1963); *United States ex rel. Collins* v. *Marony,* 287 F. Supp. 420 (E.D. Pa. 1968). Moreover while the State did offer psychiatric testimony both at the *Huntley* hearing and at petitioner's jury trial, the psychiatrists who testified had had no contact with petitioner until after his long incarceration in the Matteawan State Hospital—a full two and a half years after he gave the alleged confession as to which their testimony was supposed to be relevant. There was no medical testimony or evidence of any other kind about petitioner's treatment on the night of his arrest, although we know from the 1969 trial that such evidence existed. The record is also silent regarding the likely physical effects of drug addiction, *see e.g. United States ex rel.*

Collins v. *Marony, supra,* or the chemical properties of the drugs which appellant had ingested and their likely effect on his exercise of free will, *see e.g. Townsend* v. *Sain.**

Each of the circumstances described above casts serious doubts on the voluntariness of petitioner's waiver of his Fifth Amendment privilege and right to counsel—doubts which were never dispelled by the State's witnesses. Taken as a group, the circumstances establish a pattern of practices amounting to a deliberate violation of petitioner's rights which, when petitioner was tried alone over three years after his arrest, could easily be covered by a fog of silence and lack of recollection. Under such circumstances, the State must be found to have failed to sustain its burden of showing voluntariness during a period of illegal detainment and in the absence of counsel, and the State court must be found to have erred in letting the jury hear petitioner's supposed confession and nonetheless decide the voluntariness of any waiver.

This pattern of practices persists in New York in homicide cases, as shown in *People* v. *De Jesus, supra.* It is a pattern which in this case does not comport with the Constitutional standards mandated by this Court.

CONCLUSION

Most of the elements which in the past have led Federal courts to question and to carefully scrutinize the voluntariness of waivers of Constitutional rights are present here. These elements are present because New York's two-step arrest procedures in homicide cases gave petitioner's

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* The prosecution's psychiatrist did purport to analyze the confession itself, and testified that its coherence evidenced the sanity of petitioner at the time he made it. That testimony is empirically suspect, in light of the investigators' testimony that petitioner's "statement" was not a narrative but rather a series of answers to carefully structured questions. It is also legally suspect in light of this Court's rejection of the use of coherence as a test of voluntariness. *Townsend* v. *Sain,* 372 U.S. at 320.

arresting officers excessive latitude in seeking to obtain an inculpatory statement. Petitioner accordingly prays that the writ sought herein issue so that this Court may review the application of those procedures to the facts of this case.

Dated: New York, New York
March 21, 1979

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel., ERNEST FEELINGS, *Petitioner,* v. EUGENE LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, NEW YORK, *Respondent.*	MEMORANDUM AND ORDER — DENIAL OF CERTIFICATE — 76-C-1862

APPEARANCES:

EDWARD KELLY,
for petitioner

ATTORNEY GENERAL OF THE STATE OF NEW YORK by
MARK C. RUTZICK, and
ROBERT A. FORTE,
for respondent

WEINSTEIN, D. J.:

Ernest Feelings petitions this court for a writ of habeas corpus. He was convicted of a felony murder, arising out of the fatal shooting of one Nathan Leonard during the commission of a robbery. Petitioner's conviction was affirmed by the Appellate Division and leave to appeal to the New York Court of Appeals was denied.

The robbery and shooting occurred on December 1, 1968. Petitioner was arrested on January 8, 1969. Shortly thereafter he was adjudged mentally incompetent to stand trial and was confined in Matteawan State Hospital for approximately 2½ years. He was released from the hospital in

September, 1971 and was tried and convicted in March, 1972. The facts will be more fully developed below.

Petitioner challenges his conviction on the following grounds:

1. An inculpatory statement he had made on the day of his arrest was erroneously admitted into evidence against him because: (a) the police failed to advise him of his rights prior to taking his statement; and (b) he did not waive, and was incompetent to waive, his rights.

2. In-court identifications were tainted by illegal line-up identifications.

3. He was prejudiced by the prosecutor's reference in his opening statement to a line-up identification that had previously been excluded from evidence.

4. He was deprived of his due process right to a fair trial because the trial court failed to hold a competency hearing prior to the *Wade* and *Huntley* hearings.

5. He was denied his sixth amendment right to confront an adverse witness because one of the persons from whose descriptions the police prepared a composite picture of the perpetrator was not available for cross-examination at trial.

I.

Claim that an inculpatory statement made by petitioner was erroneously admitted into evidence against him because: 1) The police failed to advise petitioner of his rights prior to taking his statement; and 2) Petitioner did not waive, and was incompetent to waive, his rights.

Pursuant to *People* v. *Huntley,* 15 N.Y.2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 (1965), New York's implementation of *Jackson* v. *Denno,* 378 U.S. 368 (1964), the trial court held a hearing on the question of the voluntariness of the inculpatory statement made by petitioner. At the conclusion of this hearing, the trial court found that petitioner has been advised of his rights before he made the inculpatory statement attributed to him (Tr. at 263); that he was in a normal condition and fully aware of the surrounding circumstances at the time and place he made the statement (Tr. at 262); and that, therefore, the "prosecution has established beyond a reasonable doubt that [petitioner's] statements in which he is alleged to have confessed to the participation in the commission of the crime was voluntarily made and is therefore admissable in evidence; it would be submitted as a question of fact for the jury to also pass upon the voluntariness of the statement." (Tr. at 262).

Petitioner's challenge to these findings raises a question concerning the weight to be given the trial court's conclusions and whether petitioner is now entitled to an evidentiary hearing into questions of fact that have already been resolved against him in the state court.

In *Townsend* v. *Sain,* 372 U.S. 293 (1963), the Supreme Court stated that "a federal evidentiary hearing is required unless the state-court trier of fact has after full hearing reliably found the relevant facts." *Id.* at 312-13. The Court further held that:

> a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Id. at 313.

The Court added that this list of situations, the existence of any one of which will mandate the holding of an evidentiary hearing by the habeas court, does not foreclose the possibility of hearings in other circumstances as well:

> In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

Id. at 318.

Townsend v. Sain's list of circumstances which mandate holding of an evidentiary hearing has been incorporated into 28 U.S.C. § 2254(d) (1970). According to this subsection, a state court's factual determinations, evidenced by written findings, are entitled to a presumption of correctness in a subsequent federal habeas proceeding unless the existence of one of the Townsend categories or some additional circumstance (state court lacked jurisdiction; state court failed to appoint counsel to represent indigent defendant; applicant otherwise denied due process) is established. If the habeas applicant fails to make such a showing or if it appears that the state court hearing was not deficient in any of these respects, the burden is on the applicant "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d); *Tanner* v. *Vincent,* 541 F.2d 932, 937 (2d Cir. 1976).

As stated above, the trial court found that petitioner had been advised of his rights before the police took his inculpatory statement. These circumstances are not sufficient to mandate an evidentiary hearing or to rebut § 2254(d)'s presumption of correctness.

The following facts emerge from the record. Petitioner was arrested at approximately 2:30 P.M. on January 8, 1968. After he and two of his arresting officers, Caltagirone and Rinaldi, arrived at the police station, at approximately 3:30 P.M., the first of two lineups was conducted there. Thereafter, petitioner and officer Rinaldi travelled to the hospital where Mr. Abrams, a witness who had been seriously wounded during the robbery, was confined; a second lineup was held at Mr. Abrams' bedside. Petitioner had not yet been advised of his right to counsel and had not been represented at either of the two lineups. After the hospital lineup, petitioner and officer Rinaldi returned to the police station, arriving at approximately 6:30 P.M.

Officer Caltagirone testified that upon petitioner's return from the hospital, he asked petitioner to tell him what happened, and that petitioner replied that he wanted to "tell the truth" because his accomplices had "crossed" him. Thereupon, according to the police officer's testimony, officer Caltagirone read petitioner's rights to him from a written form and asked petitioner, after the recitation of

each right, whether he understood that right; petitioner answered "yes" each time and his responses were recorded on the warning form. As part of this procedure, officer Caltagirone read the following question to petitioner: "You have the right to have an attorney present with you during any questioning now or in the future. *Do you have an attorney?*" (Tr. at 93) (emphasis supplied). Petitioner answered "yes," and this response was recorded on the warning form. Because of this answer, Caltagirone believed that petitioner had an attorney (Tr. at 109), yet he did not ask petitioner who his attorney was or whether he wanted his attorney present during questioning (Tr. at 108). In response to a question from the court, officer Caltagirone stated that he had advised petitioner of his right to telephone his attorney; however, there was no notation on the warning form indicating that the officer had in fact informed petitioner of this right. (Tr. at 108).

Officer Caltagirone further testified that he again asked petitioner: "Why are you giving me this statement?" Petitioner answered: "I want to tell the truth because they crossed me." (Tr. at 95). Both the officer and petitioner then signed the form (petitioner claims that the signature was not his, but a handwriting expert testified that it was) and the officer heard and recorded petitioner's statement in a book. In that statement, petitioner admitted taking part in the robbery and shooting Mr. Leonard and Mr. Abrams, but claimed that the shootings were accidental.

Several hours later, an Assistant District Attorney was called to question petitioner further. Petitioner was again informed of his rights, but this time refused to speak without an attorney present (Tr. at 221). Later that same night petitioner began to exhibit narcotics withdrawal symptoms.

What also emerged from the record was the fact that the form from which petitioner's rights were read to him bore the notation "7:10 P.M." as the time when petitioner was given the *Miranda* warning. Yet the book in which

petitioner's statement was recorded bore the notation "6:4 P.M." as the time when the statement was taken. Officer Caltagirone conceded that "6:4" denoted a time somewhere between 6:40 and 6:49 P.M., but insisted that petitioner was advised of his rights before the statement was taken and that he had made an error in noting the time. Officer Rinaldi, who was also present at the time, also testified that petitioner's statement was taken after he had been informed of his rights. The trial judge, who took part in examining these witnesses and who had an advantage that we lack—the opportunity to observe their demeanor, *see Wright* v. *North Carolina,* 438 F.2d 405, 408 (4th Cir. 1973)—obviously chose to credit their testimony.

The record demonstrates that this factual matter has already been fully probed and developed on the state level. Petitioner nevertheless seems to assert that the state court's determination was not fairly supported by the record. If the standard for "fairly supported" is the same as the "clearly erroneous" standard that is applied in appellate review, *Wright* v. *North Carolina,* 483 F.2d 405 (4th Cir. 1973); *see also United States ex rel. Bornholdt* v. *Termullo,* 402 F. Supp. 374, 377 (S.D.N.Y. 1975), then this court cannot say that the state court's finding, that the warning preceded the confession, was not fairly supported by the record. This factual dispute was resolved on the basis of the trial court's perception of the credibility of the various witnesses. Therefore, since there was evidence to support this finding and "[s]ince the credibility of [the] testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses [it cannot be said] that the court's findings were clearly erroneous . . . ," even if some other court might have reached another result. *United States ex rel. Fitzgerald* v. *LaValle,* 461 F.2d 601, 604 (2d Cir. 1972).

The fact that there was a discrepancy between the times noted by Officer Caltagirone on the various writings is not

determinative. A similar discrepancy was urged as a ground for relief in *Bailey* v. *United States,* 410 F.2d 1209 (10th Cir. 1969). In that case, a waiver form indicated that it had been signed after the defendant confessed. An FBI agent's notes showed that his interview with the defendant began at 3:49 P.M. and concluded at 4:36 P.M.; yet the waiver form bore the notations 5:02 P.M. and 5:13 P.M. "The agent who inserted the time on the form explained the discrepancies as a mistake." *Id.* at 1213 n.4. "[The defendant] testified that this waiver was not read to him nor signed until after he had made the statement. Two FBI agents testified that prior to interrogation [the defendant] was fully advised of his right to counsel and to the other rights contained in the written waiver and that the written waiver itself was signed prior to interrogation. The conflict in this evidence was one to be resolved in the trial court. . . . The error as to the time of the waiver as shown on the form itself was not fatal." *Id.* at 1213-14.

The purely factual finding that petitioner was informed of his rights is accepted. There are, as noted below, some doubts as to the trial court's findings that petitioner was competent and that his statement was made voluntarily. These issues were considered de novo by this court.

A state court's findings are not decisive if the trial judge had applied incorrect constitutional standards in disposing of the petitioner's claim, *see Townsend* v. *Sain,* 372 U.S. at 314; for, if incorrect constitutional standards had been applied, the trial judge could not have focused his attention on or have made findings based upon all of the relevant facts. *See United States ex rel. Lewis* v. *Henderson,* 520 F.2d 896 (2d Cir. 1975); *United States ex rel. William* v. *LaVallee,* 487 F.2d 1006 (2d Cir. 1973). Therefore, although "under 28 U.S.C. § 2254(d) and the Supreme Court's decision in *LaVallee* v. *Delle Rose* . . . the habeas court must accord . . . prior state findings great weight . . . , it is equally true that the habeas court must itself insure

that the relevant facts were found and that the correct legal standards were applied to them." *United States ex rel. Williams* v. *LaVallee, supra,* 487 F.2d at 1010. "It is only where 'it can scarcely be doubted' that the relevant factual issues have been resolved against the petitioner and that 'there is no evidence that the state trier utilized the wrong [legal] standard,' that § 2254 requires the habeas court to dismiss a subsequent petition without an independent evidentiary hearing." *Id.* at 1011, quoting *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973). (In the usual case, however, the habeas court may assume that the trial court applied the correct constitutional standards to the facts. *Townsend* v. *Sain,* 372 U.S. at 293.)

Even if the state court findings are entitled to a presumption of correctness, such deference to its determinations of fact does not extend to its findings of law. As stated in *Townsend* v. *Sain:*

> Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas.

Id. at 318.

A state court's finding that a defendant's confession was voluntary is not entitled to the same respect as a factual finding—it is a mixed question of law and fact that does not foreclose the habeas court's independent review. *United States ex rel. Hayward* v. *Johnson,* 508 F.2d 322, 325 (3d Cir. 1975); *Mancusi* v. *United States ex rel. Clayton,* 454 F.2d 454, 456 (2d Cir. 1972).

Petitioner challenges the state court's findings of voluntariness on two additional grounds: 1) that he had not

waived his *Miranda* rights, and 2) that he was incompetent to waive these rights. The trial court did not adequately focus on either of these aspects of voluntariness.

The state court's conclusions of fact and of law are devoid of any finding that petitioner had waived his right against self-incrimination or his right to counsel during interrogation. *Compare, Tanner* v. *Vincent,* 541 F.2d 932, 934 n.2 (2d Cir. 1976). The trial court's findings make no mention of the fact that petitioner had indicated that he had an attorney, *compare Misner* v. *United States,* 384 F.2d 130 (5th Cir. 1967), or of the heavy burden of proof that *Miranda* v. *Arizona,* 384 U.S. 436, 475 (1966) places on the prosecution to establish waiver when an unrepresented suspect confesses. Instead, the trial court focused on the mere fact that petitioner had been given a *Miranda* warning—excluding all statements made before the warnings were given (Tr. at 257) and admitting into evidence all statements made thereafter. Yet, the Supreme Court's decision in *Miranda* v. *Arizona* established the need for not only a warning but also for a knowing and intelligent waiver of known rights. *See, United States* v. *Harrison,* 451 F.2d 1013 (2d Cir. 1971) ("The only way this essential right to counsel can be waived is by giving specific instructions to the accused informing him of his rights and then by having the accused make an intelligent waiver of such rights."). The state court's finding are deficient in this respect.

The trial court should have made the following findings: "that (1) the *Miranda* warnings were given; (2) the defendant knowingly and intelligently waived his privilege against self-incrimination . . .; (3) the defendant voluntarily, knowingly and intelligently waived his right to have retained or appointed counsel present at the interrogation; (4) the confession or statement was freely and voluntarily made." *Evans* v. *United States,* 375 F.2d 355, 360 (8th Cir. 1967). The trial court made findings only with respect to the first and last of these elements.

The defect in the trial court's findings is analagous to that in *United States ex rel. B.* v. *Shelly,* 305 F. Supp. 55 (E.D.N.Y. 1969), *aff'd,* 430 F.2d 215 (2d Cir. 1970):

> In passing upon petitioner's contention, the New York courts determined that his confessions given after appropriate warnings were "voluntary" even though those statements made before full *Miranda* warnings were given were suppressed . . . . But in considering the "voluntariness" of the confessions the state courts failed to give adequate weight to a fundamental aspect of the *Miranda* equation.
>
> Not only must a confession be voluntary, but the waiver of the rights protected by *Miranda* must be voluntary. It must, for example, be found that the defendant knowingly and willingly waived his rights to silence and counsel. The question left unanswered by the New York court is whether, under the circumstances of this case, the petitioner knowingly and willingly waived his rights to silence and counsel under *Miranda.* Since the state courts have not passed upon this issue, this Court must independently apply the appropriate federal law.

305 F. Supp. at 58.

The fact that the trial court did not expressly find that petitioner had knowingly waived his rights may not be determinative if such a finding can be inferred from the conclusions that were made (*see, United States* v. *Johnson,* 474 F.2d 6 (9th Cir. 1973)) or from the record.

A finding of waiver cannot necessarily be inferred from the trial court's conclusion that petitioner's confession was voluntary because, although waiver and voluntariness are related concepts, they present distinct issues to be determined according to different standards. *See, Williams* v. *Brewer,* 375 F. Supp. 170, 183 n.7 (S.D. Iowa 1974), *aff'd,* 509 F.2d 227 (8th Cir. 1975) ("[T]he issue with regard

to 'waiver' is whether the accused understood his rights and intelligently and voluntarily waived them, while the issue with regard to 'voluntariness' is whether the accused's actions were the product of the free exercise of his will.''). Nor can a finding of waiver be inferred from the record. It is true that defendant did make an inculpatory statement and that he eventually did invoke his right to remain silent; but neither factor is dispositive. *See, Williams* v. *Brewer,* 509 F.2d 227, 233 (8th Cir. 1975); *United States ex rel. Williams* v. *Twomey,* 467 F.2d 1248, 1251 (7th Cir. 1972). As stated in *Miranda* v. *Arizona,* 384 U.S. at 475-76:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . .
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . .
>
> . . . Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Another issue that seems to have been left unresolved was petitioner's competence to waive his constitutional rights. The trial court did hear evidence on the question of petitioner's mental condition at the time the inculpatory statement was made; both the police officers and petitioner

testified, and defense counsel was permitted to read excerpts from psychiatric reports into the record. At the conclusion of the hearing, the trial court credited the police officers' testimony that petitioner appeared normal and aware and discredited petitioner's contrary testimony, including his assertion that he had been under the influence of drugs at the time. (The trial court's findings, however, made no mention of the psychiatric report. It seems, from the record, that the trial court totally discounted its probative value.) Although the trial court did make certain findings as to the level of petitioner's understanding, it appears that these findings did not relate to the issue of knowing and intelligent waiver, but rather to petitioner's competency (i.e., his memory and ability to make an accurate statement about his acts, *see, Eisen* v. *Picard,* 452 F.2d 860 (1st Cir. 1971)) and to his understanding of the questions he was asked and the answers that he gave. Of course, a suspect's ability to understand questions asked of him and to make understandable response weighs against an assertion that he was incapable of waiving his rights. *See, United States* v. *Glasgow,* 451 F.2d 557, 558 (9th Cir. 1971). Yet, this factor is not controlling, because not only must petitioner have been capable of understanding what was said to him, but he must have had the capacity to understand the significance of a waiver. *See, United States v. Cox,* 509 F.2d 390, 392 (D.C. Cir. 1974); *United States ex. rel. B.* v. *Shelly,* 305 F. Supp. 55, 58 (E.D.N.Y. 1969), *aff'd,* 430 F. 2d 215 (2d Cir. 1970) (''A voluntary relinquishment of a constitutional right requires some understanding of what is being relinquished and of the consequences of waiver.'') Therefore, since the trial court's findings did not focus on this issue, its finding of competence is not entitled to a presumption of correctness.

This Court held a full hearing to determine whether, at the time he gave a statement to the police, on the afternoon of January 8, 1968, (A) the petitioner was competent to, and did, voluntarily, knowingly and intelligently waive his

right to have retained or appointed counsel present at the interrogation and (B) whether he was competent to, and did, voluntarily, knowingly and intelligently waive his privilege against self-incrimination. In addition to the records of proceedings in the state, the court heard Dr. Raymond Chaitin, a psychiatrist, the petitioner, and the petitioner's brothers. The court credits the testimony of the psychiatrist and finds that propositions (A) and (B) above have been established beyond a reasonable doubt.

II.

Claim that in-court identifications were tainted by illegal lineup identifications.

Within several hours of petitioner's arrest on January 8, 1968, two lineups were conducted. The first of these was at the police station where petitioner had been taken following his arrest. Mr. Anderson, one of the two witnesses to the crime, looked through a peephole at a lineup of six black men and identified petitioner and one of his accomplices. The second lineup was conducted at the hospital where Mr. Abrams, the witness who had been shot during the robbery, was confined. After six black men were led to his bedside, Mr. Abrams identified petitioner and one of his accomplices from the lineup. There was no attorney present at either lineup.

Prior to petitioner's trial, a hearing was held on the question of what identification evidence would be admitted into evidence at trial. Defense counsel moved to have the lineup identifications excluded on the grounds that there was no attorney present and that, since petitioner was the only person wearing a light jacket at the stationhouse lineup, there was a possibility of suggestion (Tr. at 59). The trial court initially refused to exclude any identification evidence from trial. After hearing detailed testimony by Mr. Abrams and Mr. Anderson about the circumstances under which they had initially observed petitioner during

the robbery and the conditions under which they had identified petitioner at the lineups, the trial court, in its findings of fact, accepted the witness' version of the events, (Tr. at 59-62) making the following conclusions of law:

> I find that the prosecution has established by clear and convincing evidence that the identification of this defendant was in no way tainted and not in violation of the defendant's rights, statutory or constitutional; that it was not as a result of suggestion by an officer and/or policeman and/or other person; that these identifications based upon their observations made at the time and place of the occurrence and of the defendant whom they identified from this witness stand, and therefore, I hold that the in-court identifications are admissible. . . .

Tr. at 62-63.

The following day, the trial judge amended his findings with respect to the lineup identifications:

> Upon review of the testimony and further research into the law . . . I hold that I am not going to admit evidence of the lineup from which it is claimed the defendant was identified. I am not going to admit it. But I am still holding that by clear and convincing evidence the prosecution has established that the in-court identification of the defendant is in no wise affected or tainted, induced, or suggested by the prosecution at the line-up where there was no attorney present.

Tr. at 144-45.

There are two constitutional grounds for excluding identification evidence: the fourth amendment's guarantee of due process and the sixth amendment right to counsel.

Even if the right to counsel had not yet attached, it would have been a denial of due process to have subjected

petitioner to "a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification." *Kirby* v. *Illinois,* 406 U.S. 682, 691 (1972). *See also, Simmons* v. *United States,* 390 U.S. 377, 384 (1968); *Stoval* v. *Denno,* 388 U.S. 293, 302 (1967). From the record, it does not appear that the lineups can be so characterized. The only possibly suggestive element in the post-arrest identifications of petitioner is that petitioner wore a light jacket during the police station lineup. In *Wade,* the Supreme Court gave examples of lineups it considered suggestive, and included among them those in which the accused is forced to wear distinctive clothing which the perpetrator allegedly wore. *United States* v. *Wade,* 388 U.S. 218 (1967). *See also, Foster* v. *California,* 394 U.S. 440, 441 (1969) (petitioner wore leather jacket during lineup, similar to the one the witness had seen on the robber); *United States ex rel. Cannon* v. *Montanye,* 486 F.2d 263, 267 (2d Cir. 1973) (petitioner wore green shirt during lineup, like the one the witness' assailant had worn). Here, the color of the jacket had no significance because the perpetrator of the crime for which petitioner was convicted was described as having worn a dark jacket. Further, it does not seem that the jacket was so striking in appearance as to draw the witness' attention to petitioner. *Compare, United States ex rel. Anderson* v. *Mancusi,* 413 F.2d 1012, 1014 (2d Cir. 1969) (lineup not unduly suggestive even though the petitioner had worn a striking red shirt). Therefore, a finding of impermissible suggestiveness is not warranted by the facts.

A second ground for excluding such evidence is a violation of the accused's right to counsel. This appears to have been the ground relied upon by the trial court, even though the lineups here in question were conducted after petitioner's arrest but before his arraignment, and, under *Kirby* v. *Illinois,* 406 U.S. 682, 688 (1972), "a person's right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." At the time of petitioner's *Wade* hearing, *Kirby* had not yet

been decided and the trial court may have believed that *Wade,* which was concerned only with the right to counsel at post-indictment lineups, was applicable to petitioner's pre-indictment lineups. This inference is bolstered by the trial court's use of the "clear and convincing" burden of proof which *Wade* has imposed on the government to establish that an in-court identification is not tainted by a lineup conducted in violation of an accused's right to counsel.

When a lineup identification is excluded from evidence because the defendant had been denied his right to counsel, there is no "per se rule of exclusion" with respect to in-court identifications of the accused by witnesses who had previously identified him at that lineup. Rather, if the prosecution can "establish by clear and convincing evidence that the in-court identifications [are] based upon observations of the suspect other than the lineup identification," *United States* v. *Wade,* 388 U.S. 218, 240 (1967), i.e., "that the in-court identification had an independent origin and was not tainted by the prior illegal procedures," *United States ex rel. Robinson* v. *Vincent,* 371 F. Supp. 409 (S.D.N.Y. 1974), *aff'd,* 506 F.2d 923 (2d Cir. 1975), then courtroom identifications of the accused are permitted. In determining whether an in-court identification has as its origin a source independent of the lineup, the trial court must consider a number of factors:

> for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. *United States* v. *Wade,* 388 U.S. at 241.

An additional element is " 'the degree of suggestion inherent in the manner in which the prosecution presents

the suspect to witnesses for pretrial identification.' *United States* v. *Wade, supra,* 388 U.S. at 228 . . . . Hence the nature of the police station confrontation must be considered in reaching a conclusion as to independence of recollection of a witness subject to it." *United States ex rel. Robinson* v. *Vincent,* 371 F. Supp. at 416.

It seems, from the record, that all of the relevant factors were fully probed and developed during the *Wade* hearing. Both Mr. Anderson and Mr. Abrams testified in minute detail as to what they observed on December 1, 1968, the day of the shooting. Mr. Abrams testified that he saw petitioner and two other men enter his well lighted office and that he saw petitioner's face as petitioner passed by him to enter the office of Mr. Leonard. Mr. Abrams further testified that he entered Mr. Leonard's office after hearing a shot and hearing Mr. Leonard cry out. In that office, he saw petitioner with a gun and Mr. Leonard lying on the floor bleeding. Mr. Abrams stated that he attempted to kick petitioner and that petitioner then shot him, first in the knee and then in the back. Mr. Anderson testified that he also saw three men enter the office that he occupied with Mr. Abrams. He stated that he saw petitioner go to the door of Mr. Leonard's office and that he saw petitioner pull a gun. He then heard petitioner and Mr. Leonard exchange words, saw petitioner shoot Mr. Leonard, and saw Mr. Abrams run into Mr. Leonard's office. Both Anderson and Abrams were cross-examined not only as to these details but also with respect to their opportunity to observe and their descriptions of the gunman which they gave to the police after the robbery.

The details of the lineups, at which both Anderson and Abrams identified petitioner as the gunman, were also explored. Mr. Abrams testified to a six-man lineup at his hospital bedside. He stated that before the lineup he was told that a number of people would be brought in, that he was to look at them, and that he was to tell the detective

whether he recognized anyone. Mr. Abrams stated that the detective did not tell him who would be in the group exhibited to him. Mr. Anderson testified to a six-man lineup at the police station. He answered negatively when asked whether he was ever told or whether it was ever suggested that petitioner would be in the lineup, and added that he picked out petitioner because he saw him shoot Mr. Leonard.

Petitioner's challenge to the trial court's findings, made after all these facts were developed, again raises a question concerning the weight to be given a state's court's findings. The principles discussed in the previous section are applicable here.

None of the defects which, under *Townsend* v. *Sain,* 372 U.S. 293 (1963), mandate an evidentiary hearing seem to exist with respect to the issue of taint. All of the factors that, under *United States* v. *Wade, supra,* should have been considered have already been fully developed. There is no indication that the trial court failed to take the relevant facts into account. Additionally, and in contrast to its findings on the question of voluntariness, "not only is there no evidence that the state trier utilized the wrong standard, but there is every indication that he applied the correct standards." *LaValle* v. *Delle Rose,* 410 U.S. 690, 695 (1973). The trial court's findings show that it recognized that the burden on the prosecution was to establish by clear and convincing evidence that the in-court identifications were not tainted by the illegal lineups; this is the burden of proof imposed by *Wade.* To cull from *United States ex rel. Williams* v. *LaVallee,* 487 F.2d 1006 (2d Cir. 1973): "where 'it can scarcely be doubted' that the relevant factual issues have been resolved against the petitioner and . . . 'there is no evidence that the state trier utilized the wrong [legal] standard,' . . . § 2254 requires the habeas court to dismiss a subsequent petition without an independent evidentiary hearing." *Id.* at 1011, *quoting LaVallee* v. *Delle Rose, supra.*

III.

Claim that petitioner was prejudiced by the prosecutor's reference in his opening statement to a lineup identification that had previously been excluded from evidence.

During his opening statement, the prosecutor told the jury that it would hear Mr. Abrams, the witness who had identified petitioner at the hospital lineup, relate how he had identified petitioner and one of his accomplices at that lineup. Defense counsel did not object to this remark. The trial court had cautioned the jury at the outset that an opening statement is not evidence (Trial Tr. at 4). When the prosecutor finished his opening statement, the court stated: "I will strike from the opening of the district attorney the fact that the witness who identifies this defendant identified another person" (Trial Tr. at 19). This statement may have hurt more than it helped petitioner because it was directed only to that part of the prosecutor's remark which referred to the identification of petitioner's accomplice; yet, here again, no objection was made. After defense counsel finished her opening, the court again cautioned the jury not to consider an opening statement as evidence and added that, since the opening statements may have referred to matters that would not be permitted into evidence the jury should rely only on evidence from the witness stand (Trial Tr. at 24-25).

Respondent argues that defense counsel's failure to object to the prosecutor's opening statement amounted to a waiver of that objection and foreclosure of habeas review. *See, e.g., United States ex rel. Satz* v. *Mancusi,* 414 F.2d 90 (2d Cir. 1969). This argument is based on the correct premise that New York law requires a contemporaneous objection to have been made to the allegedly improper remark to preserve the issue for appellate review. CPL 470.05(2); *see, e.g., People* v. *DeTore,* 34 N.Y.2d 199, 313 N.E.2d 61, 356 N.Y.S.2d 598 (1974); *People* v. *Kuss,* 32 N.Y.2d 436, 299 N.E.2d 249, 345 N.Y.S.2d 1002 (1973). How-

ever, this is only the general rule, subject to an exception: had the prosecutor's remark deprived petitioner of a fair trial or of a fundamental constitutional right, it would have been available as an issue on appeal and could have led to reversal of petitioner's conviction, notwithstanding the lack of objection. CPL 470.15(3), (6)(a); *see, e.g., People* v. *Arthur,* 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S. 2d 663 (1968); *People* v. *McLucas,* 15 N.Y.2d 167, 204 N.E.2d 846, 256 N.Y.S.2d 799 (1965); *People* v. *Smith,* 246 N.Y.2d 156, 20 A.D.2d 579 (2d Dept. 1969); cf., *People* v. *Rahming,* 26 N.Y.2d 411, 259 N.E.2d 727, 311 N.Y.S.2d 292 (1970) (pre-trial motion to suppress all evidence of lineup identifications preserves objection for appellate review, notwithstanding lack of objection at trial). Under these circumstances, therefore, "petitioner was not precluded from asserting his constitutional claim on federal habeas by his failure to make contemporaneous objections at trial." *Malley* v. *Mason,* 547 F.2d 25, 28 (2d Cir. 1976).

On the merits, although "[i]t may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable," *Frazier* v. *Cupp,* 394 U.S. 731, 736 (1969), there are a number of factors militating against such a finding here: the challenged remark was short and certainly not vital, considering the other evidence in the case; it was made during an opening statement and was not repeated at trial; the trial court had cautioned the jury that an opening statement is not evidence. *Compare Frazier* v. *Cupp,* 394 U.S. at 733-37. In *Frazier,* the Supreme Court ruled that such an instruction was sufficient to protect the petitioner's rights in that case, adding that "[a] more specific limiting instruction might have been desirable, *but none was requested.*" *Id.* at 736 (emphasis supplied). Another factor is defense counsel's failure to object. Although this element does not foreclose habeas review, "[t]he absence of contemporaneous objections or requests for cautionary instructions are factors to be taken into

consideration" in determining whether petitioner was denied a fair trial. *Malley* v. *Connecticut*, 547 F.2d 25, 28 (2d Cir. 1976). For these reasons this claim has no merit.

IV.

Claim that petitioner was deprived of his due process right to a fair trial because the trial court failed to hold a competency hearing prior to the *Wade* and *Huntley* hearings.

In *Pate* v. *Robinson*, 383 U.S. 375 (1966), the Supreme Court stated that "the conviction of an accused person while he is legally incompetent violates due process." *Id.* at 378. Although the Court did not hold that due process requires that a competency hearing be held at any specific stage of a criminal proceeding, it did state that "state procedures must be adequate to protect this right." *Id.* Illinois' procedure for determining an accused's capacity to stand trial, which provided for a competency hearing whenever the evidence raised a "bona fide doubt" as to an accused's competency, was characterized by the *Pate* Court as a procedure that "jealously guards" an accused's right not to be tried while incompetent. *Id.* at 385.

The Supreme Court reaffirmed and elaborated upon this aspect of due process in *Dorpe* v. *Missouri*, 420 U.S. 162 (1975). Incorporating the test of incompetency enunciated in *Dusky* v. *United States*, 362 U.S. 402 (1960), the Court stated that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." 420 U.S. at 171. Missouri's procedure for determining an accused's competency was analagous to the Illinois procedure discussed in *Pate*. It provided for a competency hearing whenever the trial judge had "reasonable cause" to believe that an accused was incompetent to stand trial. The court characterized this practice as "constitutionally

adequate" on its face. *Id.* at 173. The particular proceeding in question, however, was held to have been inconsistent with the defendant's right to a fair trial because the evidence created a doubt about his competency sufficient to necessitate further inquiry into the matter. *Id.* at 180.

In neither *Pate* nor *Dorpe* did the Supreme Court hold that due process requires that a competency hearing must always be held prior to trial regardless of the evidence. *See, United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105 (2d Cir. 1972); *United States ex rel. Evans* v. *LaVallee*, 446 F.2d 782 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972). Instead, the Court found that a scheme is constitutionally adequate if it provides for an inquiry into an accused's capacity to stand trial only at such time as there is reasonable cause to believe that the accused is in fact incompetent. In both *Pate* and *Dorpe* the ultimate disposition turned on the fact that although there was ample evidence to suggest that the particular defendants were incompetent, the trial courts failed to conduct hearings to determine the defendants' mental capacity to stand trial. In other words, the defect lay not in the statutory schemes but in the particular proceedings which failed to implement them.

New York law comports with the procedures that the Supreme Court found constitutionally adequate in *Pate* and *Dorpe*. In New York, "a defendant is not entitled, as a matter of right, to have the question of his capacity to stand trial passed upon before the commencement of the trial, if the court is satisfied from the available information that there is no proper basis for questioning the defendant's sanity." *People* v. *Armlin*, 37 N.Y.2d 167, 171, 371 N.Y.S.2d 691, 695 (1975). However, "[i]f at any time before final judgment in a criminal action it [appears] to the court that there is reasonable ground for believing that a defendant is in such a state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or pro-

ceedings or of making his defense, it is the duty of [a New York] court to direct him to be examined in these respects." *People* v. *Smyth,* 3 N.Y.2d 184, 187, 143 N.E.2d 922, 1924, 164 N.Y.S.2d 737, 739 (1957), *quoted with approval in People* v. *Armlin, supra.* As in *Pate* and *Dorpe,* then, the decisive issue seems to be whether this procedure was properly implemented in the criminal proceedings to which petitioner was a party. Stated differently, the question is whether, prior to the *Wade* and *Huntley* hearings, there was reasonable cause to believe that petitioner was incompetent and, if there was, whether petitioner was deprived of his constitutional rights because a competency hearing was not held at that time.

Whether an inquiry into a defendant's mental capacity to stand trial is required depends upon a number of factors: "evidence of [his] irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Dorpe* v. *Missouri,* 420 U.S. at 180. Prior to the *Wade* and *Huntley* hearings, which were held on December 1-2, 1971, the only evidence before the trial court, bearing upon the question of petitioner's competency, was his 2½ year confinement in, and recent release from, Matteawan State Hospital and a psychiatric report which concluded that petitioner was capable of standing trial. Because of this medical opinion, the trial court proceeded with the *Wade* and *Huntley* hearings without directing that petitioner be further examined. Shortly thereafter, however, the trial judge learned that the psychiatric report he had relied upon had not been prepared as recently as he had believed. So on December 6, 1971, notwithstanding this favorable report, petitioner's rational behavior during the hearings, and defense counsel's objections (although "[c]ounsel's opinion as to competency . . . is entitled to probative value," *United States ex rel. Curtis* v. *Zelker,* 466 F.2d 1092, 1095 n.8 (2d Cir. 1972)), the trial judge ordered that the jury be excused, that petitioner be sent to Kings

County Hospital for a psychiatric examination, and that a hearing as to petitioner's capacity to stand trial be held. Pursuant to this order, petitioner was so examined and a competency hearing was held on February 8, 1972. At that hearing, psychiatric reports concluding that petitioner was competent to stand trial were confirmed on defense counsel's motion and the trial court ordered that the proceedings be resumed.

As stated above, because of the favorable report concerning petitioner's capacity to stand trial, which was submitted to the trial court prior to the *Wade* and *Huntley* hearings, the trial judge proceeded with those hearings without directing that petitioner be examined again. Even assuming that, notwithstanding this favorable report, there was reasonable cause to believe that petitioner was incompetent prior to the hearings, petitioner was not prejudiced by the fact that no inquiry as to his capacity was initiated at that time but was deferred until after the *Wade* and *Huntley* hearings were completed. The Supreme Court has never held that there can be no constitutionally adequate substitute for holding a competency hearing immediately upon learning that reasonable grounds for a hearing exist. To the contrary, the Supreme Court has suggested, in dictum, that even if the facts mandate a competency hearing, it may be permissible to defer such a hearing until the trial is completed. "Such a procedure may have advantages, at least where the defendant is present at the trial and the appropriate inquiry is implemented with dispatch." *Dorpe* v. *Missouri,* 420 U.S. at 182. *See also, Jackson* v. *Indiana,* 406 U.S. 715, 740-41 (1972).

In *United States* v. *Bernstein,* 417 F.2d 641 (2d Cir. (1969), the Court of Appeals for the Second Circuit was faced with an argument analagous to that raised by petitioner. There, the defendants urged that they had been denied due process because the trial court failed to make a timely determination of their physical capacity to stand

trial. The Court of Appeals said that "[a]lthough he might have been better advised to hold a pre-trial hearing concerning the defendants' ability to stand trial, [the trial judge] did not abuse his discretion in refusing to do so," *Id.* at 643, because he acted in reliance upon a physician's oral report that the defendants were able to stand trial. The Court of Appeals went on to say that even if the lower court's failure to conduct a pre-trial hearing was an abuse of discretion, this error was corrected when the trial judge did in fact grant a hearing at the close of the prosecution's case.

By analogy, even if the trial judge abused his discretion by failing to order a competency hearing prior to petitioner's *Wade* and *Huntley* hearings, this error was corrected when the court ordered that petitioner be reexamined and that a competency hearing be held prior to the trial itself.

In this case, the testimony of Dr. Chaitin in this court showed beyond a reasonable doubt that defendant was fully competent at the time of the *Wade* and *Huntley* hearings. Any possible ambiguity of the state record on this score was resolved in respondent's favor by the federal habeas hearing.

V.

Claim that petitioner was denied his sixth amendment right to confront an adverse witness because one of the persons from whose descriptions the police prepared a composite picture of the perpetrator was not available for cross-examination at trial.

This claim is reminiscent of that raised in *United States ex rel. Meadows* v. *New York,* 426 F.2d 1176 (2d Cir. 1970), *cert. denied,* 401 U.S. 941 (1971), where the petitioner argued that he had been denied the right to confront two witnesses who had appeared before the grand jury which had indicted him but who had not appeared as witnesses at his trial. This contention was rejected because "the sixth

amendment applies to evidence actually disclosed at trial" and "a defendant has no right to confront a 'witness' who provides no evidence at trial." *Id.* at 1184. This language is applicable to the claim urged by petitioner. Mr. Al Rony, who was one of the persons who had described the perpetrator to a police artist, did not appear as a witness at trial and the composite drawing prepared, in part, from his description was not displayed to the jury. Since Mr. Rony provided no evidence at trial, petitioner's claim that he was prevented from cross-examining this "witness" is without merit.

The state record as well as the hearing held in this court demonstrates that no constitutional right of petitioner has been violated. Accordingly, the petition must be dismissed. For the reasons stated above a Certificate of Probable Cause for Appeal is denied.

The Clerk shall send a copy of this memorandum and order to petitioner and to counsel.

So Ordered.

Dated: Brooklyn, New York
March 22, 1978

/s/ Jack B. Weinstein
U. S. D. J.